

CC-2007-007

February 23, 2007

Subject: E-Discovery Amendments to the Federal Rules of Civil Procedure	Cancel Date: Upon incorporation into CCDM
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I. Purpose and Scope

Effective on December 1, 2006, the Federal Rules of Civil Procedure were amended to specifically include references to and requirements for the discovery of electronically stored information (ESI). The amendments to the FRCP will directly affect litigation in any court that follows the FRCP, e.g., the U.S. District Courts and the U.S. Bankruptcy Courts. Although the amendments to the FRCP are not directly applicable to the U.S. Court of Federal Claims and the U.S. Tax Court, each of which has adopted rules of practice and procedure that are similar to, but separate and apart from, the FRCP, these courts often look to the FRCP for guidance.

The ESI-related amendments to the FRCP are clarifying amendments to the process and procedure addressing ESI discovery issues. Inasmuch as ESI has historically been subject to discovery in the same fashion that paper documents have been subject to discovery, these amendments do not purport to change what is and what is not discoverable.

As a result of the new amendments to the FRCP, Chief Counsel personnel must be familiar with the amendments to the FRCP for purposes of preparing suit letters and defense letters to the Department of Justice in tax-related cases and other cases and assisting the Department in connection with the litigation of those cases. Although the amendments to the FRCP are not applicable in the Court of Federal Claims and the Tax Court, the amendments may have an impact on future litigation in these courts.

II. ESI Changes to the FRCP

The text of the ESI amendments to the FRCP along with the Advisory Committee Notes can be found at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. The text of the ESI amendments to the FRCP are also attached to the April 12, 2006 letters from the Chief Justice of the U.S. Supreme Court transmitting the amendments to the Speaker of the House of Representatives and the President, United States Senate that can be found at <http://www.supremecourtus.gov/orders/courtorders/frcv06p.pdf>.

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Set out below is a summary of, and in several instances key language of, the ESI amendments to the FRCP:

- Rule 16(b)(5) and (6) — Adds the requirement that pretrial scheduling orders may include provisions for the disclosure or discovery of ESI and any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production. Thus, the parties must be prepared to discuss details about their ESI information; their ESI systems, applications and routine operations; and their ability to access and preserve ESI early in the litigation.
- Rule 26(a)(1)(B) — The term “electronically stored information” is added to the mandatory disclosure requirements. ESI includes, but is not limited to, e-mail and other electronic communications, word processing documents, spreadsheets, electronic calendars, telephone logs, Internet usage files, and network access information.
- Rule 26(b)(2)(B) — Provides for a “two-tier” approach to sorting through issues involving ESI that is not reasonably accessible because of undue burden or cost. This is an important Rule change – it specifically addresses proportionality and cost-benefit concepts that have not been, to date, handled consistently by the courts. This Rule states:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. [Tier One] On motion to compel discovery or for a protective order, the party from whom discovery is sought must show the information is not reasonably accessible because of undue burden or cost. [Tier Two] If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for such discovery.

- Rule 26(b)(5)(B) — Provides a process for resolving claims of privilege and protection of trial preparation materials involving inadvertently produced information. To date, the process for resolving claims of privilege or protection of trial preparation materials that have been inadvertently produced has developed ad hoc from court to court and circuit to circuit. This Rule states:

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

- Rule 26(f) — As part of their pretrial conference, the parties must discuss any issues relating to disclosure or discovery of ESI, including the form or forms of production, the location of relevant information and its accessibility, the impact of normal operations on preservation of the relevant information, and issues relating to inadvertent disclosure of privileged or work product information.

- Rules 33(d), 34(a)(1) and 34(b) — ESI is identified as a business record for interrogatory purposes and defined as a separate category, and not a sub-set of documents, for document production purposes. A document production request may specify the form or forms ESI is to be produced and, if an objection is made to the method of production, the responding party must state the form or forms it intends to use. If the requesting party fails to specify the form or forms of production for ESI, the responding party is required to state the form of production it intends to use. Stating the intended form of production before the production occurs may permit the parties to identify and seek to resolve disputes before the effort and expense of production occurs.
- Rule 34(b)(ii) — Absent agreement by the parties or an order of the court, the default procedure for producing ESI is: "... in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable" This is a significant ESI-related change. A party need not produce the same ESI in more than one form.
- Rule 37(f) — A new "safe harbor" is added to the sanctions provisions addressing issues relating to ESI. This is one of the more important Rule changes given the growing number of cases, with disparate results, that involve sanctioning parties and counsel over the discovery of ESI, and particularly ESI that has been destroyed by or are no longer available to a party that is subject to an ESI production request. The importance of, and good faith adherence to, document retention policies play an important part in determining whether a court can impose sanctions against a non-producing party. This Rule states:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine, good faith operation of an electronic information system.

- Rule 45 — Conforming technical amendments are made to the rule on subpoenas in order to accommodate the other ESI-related amendments to the FRCP.
- Form 35 — Conforming changes are made to the parties' report to the court regarding their discovery plan, which must include a description of how the disclosure or discovery of ESI is to be handled.

III. Electronic Records and Document Retention Policies

Chief Counsel personnel are expected to be familiar with the electronic records and document retention policies applicable to the Service and the Office of Chief Counsel, and particularly the document retention policies applicable to ESI. These policies are located in both the IRM and the CCDM portion of the IRM. Understanding how these policies are generally applicable to the Service and the Office of Chief Counsel and how these policies may apply in any given case are important considerations that should be addressed in both our suit letters and defense letters and on-going assistance in the litigation.

With respect to electronic records and document retention policies, the following sections of the IRM and CCDM are important reference sections:

IRM 1.10.3	Standards for Using E-Mail
IRM 1.15.3	Disposing of Records
IRM 1.15.5	Relocating/Removing Records
IRM 1.15.6	Managing Electronic Records

IRM 1.15.7	Files Management
IRM 1.15.13 to 1.15.15	Records Control Schedules for Chief Counsel Functions
CCDM 30.6.1.2.3	Electronic Mail Use
CCDM 30.9.1.6	File Retention and Exceptions (Freezes)

Electronic records that are relevant or potentially relevant to ongoing or expected litigation should be retained beyond their normal retention period in order to serve the litigation needs and obligations of the Service and the Office of Chief Counsel and to avoid any potential spoliation inference if relevant documents are not retained.

IV. Litigation Assistance to the Department of Justice

In order to assist Department of Justice attorneys in addressing their obligations under the ESI-related amendments to the FRCP, suit letters and defense letters must address ESI issues. As noted in Section I, above, the ESI-related amendments to the FRCP are clarifying amendments to the process and procedure addressing ESI discovery issues, and these amendments do not purport to change what is and what is not discoverable.

Advice provided and positions taken on ESI issues in suit letters, defense letters, and other advice provided to the Department must take into account applicable Service and Chief Counsel document retention policies, including, but not limited to, the instructions and directions contained in the IRM and CCDM sections listed Section V, above.

Suit letters and defense letters must: (1) identify any ESI that is relevant to the case, (2) state which of this ESI is reasonably accessible and which is not reasonably accessible, (3) advise the Department of the steps that the Service has taken to preserve any reasonably accessible ESI from alteration and destruction and (4) describe the Service's ESI record retention and preservation policies and practices.

Consistent with past practice and absent unusual or exceptional circumstances, Department attorneys will be instructed to either enter into stipulations or move for an order providing that ESI will be produced in paper form.

In addition to addressing ESI issues in the initial suit letter or defense letter, ESI issues are likely to surface throughout the life of a case, and particularly in the discovery phase of a case. Counsel personnel must routinely monitor the status and progress of cases assigned to them to ensure that ESI issues are timely considered and addressed and that the interests of the Service and the Office of Chief Counsel are adequately protected. Counsel personnel must monitor and document the steps taken to ensure the preservation of potentially discoverable ESI. Counsel personnel must be sensitive to instances involving the potential for "litigation holds" that may be placed on the Service and Counsel in the form of preservation requests made by or through the Department and preservation orders entered by a court. Preservation requests and preservation orders have the potential for significantly disrupting the normal operations of the Service and the Office of Chief Counsel even in isolated instances, and should be the rare exception and not the rule. Preservation requests and preservation orders will be addressed on a case-by-case basis. Counsel personnel should also be mindful that an obligation to preserve evidence may arise before litigation is actually commenced if litigation can be reasonably anticipated.

V. Coordination and Contact Information

Routine issues relating to ESI in discovery, including, but not limited to, case-specific ESI issues arising under the FRCP and general requests for ESI-related practices and policies from individual U.S. Attorney's Offices, must be coordinated with APJP Branch 3 at 202-622-7950. Requests for preservation requests or litigation holds for ESI must immediately be brought to the attention of the appropriate Area Counsel and APJP Branch 3. Issues regarding preservation orders that are anticipated or have been proposed and preservation orders that have been entered must immediately be brought to the attention of the appropriate Division Counsel and the Associate Chief Counsel (Procedure & Administration) through APJP Branch 3.

/s/
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